1961

James N. Thomas, and Kathleen Mcmurtrey Thomas v. The Children's Aid Society, of Ogden, A Corporation : Respondent's Brief

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IN THE SUPREME COURT
of the
STATE OF UTAH

JAMES N. THOMAS and
KATHLEEN McMURTREY THOMAS,

Appellants,

vs.

THE CHILDREN'S AID SOCIETY
OF OGDEN, a corporation,

Respondent.

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Inasmuch as appellants fail to make any real statement of facts, it becomes necessary to an understanding of the points of law involved that respondent attempt a brief statement.

The appellant James N. Thomas is a negro. Kathleen McMurtrey Thomas, as she calls herself, is a white woman. However the respondent (hereinafter referred to as defendant, as in the court below) denies that the difference in race is material or that it constitutes any legal issue or the basis for any material legal issue in this case.

Plaintiff Kathleen was born December 22, 19[illegible] (R 183, page 2) so she was twenty-seven years old at the time she released her child for adoption as hereinafter set out. She attended college one year and then had one year of business training at the Idaho Falls Business School in Idaho Falls, Idaho. Thereafter she traveled about a good deal, both in the intermountain country and in the south and in the southwest and held many jobs both as a domestic and in the secretarial field. She was clearly an experienced business woman. (Deposition R 183, pages 4 to 21 inclusive, admitted T. 88-89.)

Plaintiff Thomas was born November 11, 1926. He lived in Ogden, Utah continually for fifteen years preceding the taking of this deposition on April 23, 196[illegible] (Deposition R 182, page 4). He has worked at various jobs, including storekeeper, lift operator and warehouseman for the government and dishwasher and cook for the Union Pacific Railroad and cook for some other establishments over brief periods of time. Apparently, however, he was in Moab, Utah, from 1953 to 1957, on a job as cook in a cafe.

On June 3, 1956, James Thomas and Anna Lou Davison were married at Helper, Utah (R 47, Deposition R 182, pages 20 and 21). Thomas's wife, Anna Lou Davison Thomas, sued for divorce in Carbon County, Utah. No decree of divorce was made or entered until April 4, 1960, one day before this action for habeas corpus was brought, so that Thomas's marriage to his wife, Anna Lou Davison, continued until that decree became final on July 4, 1960. (R 50-51, T 16-17)

In August of 1957, plaintiff Kathlen McMurtrey was

working in Ogden. She walked down to the Porters and Waiters Club and there picked up the plaintiff James Thomas, who was working there as a bartender. From then until October she and Thomas dated. (Deposition R 185, pages 23 and and 24, 27 and 28). She left Ogden briefly but returned in February of 1958 and resumed her association with Thomas. From then on they saw each other two or three times a week. She became regularly his mistress, going with him to his room where he lived, and as a result she became pregnant. (Deposition R 183, pages 28 to 30).

After she knew she was pregnant, Kathleen and Thomas moved into an apartment in Ogden, where they lived together until Christmas time in 1958. She went home for Christmas in 1958. Her parents saw she was pregnant and were much upset. They insisted upon bringing her back down to Ogden from Idaho where they lived, arriving on the 30th of December. On this visit they learned for the first time that Kathleen's lover was a negro. They felt that this was a complicating factor and that marriage, which had been tentatively considered, probably would never work out. They took Kathleen with them that night to stay at a motel, and the next day went to her obstetrician, to whom they confided something of their problem. The obstetrician suggested that they get in touch with the Children's Aid Society of Ogden, a child placing agency licensed by the state of Utah to carry on an adoptive program and to assist unmarried mothers. (T 8-15, 21-27)

At this time Kathleen was unable to work because of her pregnancy and Thomas had lost his work and the rent was past due so that Kathleen felt that her present

situation was entirely untenable. (T 60, Deposition Ex. 18, p. 47.)

On the afternoon of December 31, 1958, Kathleen went with her parents to see Mr. Wheatley at the Children's Aid Society. Mr. Wheatley explained the services and assistance which this agency could furnish and Kathleen decided to avail herself of those services in view of her then untenable position. Mr. Wheatley then made arrangements to place Kathleen in a foster home in Brigham City, Utah, and that same evening her clothes were picked up from Thomas's apartment and she was taken to the Brigham City foster home where she stayed until she was delivered on April 13, 1959. (T 100-105, 28-29)

It is conceded that the child was born out of wedlock, and so alleged in the amended petition (R 54).

On the next day, Mr. Wheatley, Executive Secretary of Children's Aid Society, called on Kathleen at the Cooley Hospital in Brigham City and there discussed with her plans for her child. (T 123) This was a culmination of a series of visits Mr. Wheatley made to Kathleen at the foster home through January, February, March, and April of 1959, in which he discussed her problems with her in an effort to aid her to come to a conclusion. (T 97 to 123) In counseling with Kathleen Mr. Wheatley, in accordance with practice, used the so-called "non-directive" method in which he carefully abstained from making any positive suggestions, but merely asked questions of her to help her consider and evaluate all of the problems and alternatives. He explained to her that she had a right either to keep her child or to

release it to the agency for adoption, and they considered together the probabilities. During the course of these conversations Kathleen commented that she did not know whether she could marry James, as she was not sure that he was divorced, that James had not worked steadily and did not appear to be too reliable, and that she recognized the situation would be difficult if she were forced to work to support herself and her baby, either after a marriage to James or after she should decide to keep the child with her without marrying James. She recognized the difficulty in rearing a child which was the product of an inter-racial relationship in a prejudiced community, although she thought that it might be possible that she and perhaps James could move into a community where such prejudice was not so marked, in the event she should decide to keep the baby and marry James. She recognized that a mulatto child reared by an inter-racial couple might experience some prejudice from both races. She recognized that the child's welfare would probably be best served by authorizing the defendant, Children's Aid Society, to place it for adoption in a home where it would not experience the results of these difficulties and where it would match as nearly as possible the general racial appearance of its adoptive parents. At the same time she had an emotional reluctance to part with her own flesh and blood. However, whenever, as she occasionally did, she indicated she might keep the child, Mr. Wheatley would say that if this was what she wanted, this was what she should do, and she would immediately react and raise the objections and difficulties. On several occasions prior to the birth of the child she had expressed to Mr. Wheatley, at the end of interviews, that her best conclusion was

that her own welfare and that of the child required that she place the child for adoption. These same problems had been discussed in a preliminary way on the first visit. (T 99 to T 123 inclusive).

On the occasion of Mr. Wheatley's visit to Kathleen at the hospital after the birth of the child, these same problems were again discussed and referred to. (T 124 to 132) At that time Kathleen said she felt her parents wanted her to release the child, but Mr. Wheatley advised her that this decision was hers alone. (T 125, line 26, to T 126, line 8, and T 126, line 17 to T 126, line 29). At the conclusion of the conversation, Kathleen signed a release of the child to the defendant agency, placing it for adoption, and delivered it to Mr. Wheatley, who took her acknowledgment as a Notary. He did not, however, administer any oath to her. (Defendant's Exhibit 1, T 53) Prior to its signing, she had looked at the document and noticed that it should be "notarized" and inquired about it. Mr. Wheatley had told her that he was a Notary and could notarize it. It was against this background that she executed it before him and delivered it to him.

It is interesting to note, in view of the tendered issue of coercion, that at the time Kathleen executed this release for adoption, she told Mr. Wheatley that she had received a letter a day or two before from a boyfriend in England and that he wanted her to come to England and marry him. He was from the middle East. This was apparently Mr. A. K. Sadoon, a former student from Baghdad, Iraq, whom she had dated for some time. She stated to Mr. Wheatley that she was going to write him and tell him that she would not go to England but

that if he was interested in her, for him to come to the States and see her, and she would then consider plans with him. (T 132, R 183, page 26 and 27).

After releasing her child, she left the hospital and returned to Idaho with her parents, where she stayed for several weeks. While there she apparently had a change in heart, for she left her parents' home, took the bus to Ogden, and got in touch with James Thomas, and they demandel that the child be returned. They were told that the child had already been placed, that Kathleen had been advised that the release when made was final, and that it would be impossible to return the child to them then. This was in the forepart of June, 1959.

Thomas and Kathleen then decided to get married to reinforce their position. Being advised that miscegenous marriages were unlawful in Utah, they then left Utah on June 18, 1959, and went to Malad, Idaho, where they went through a marriage ceremony, after which they returned immediately to Ogden. It is to be remembered that at this time James Thomas was still married to Anna Lou Davison.

They then renewed their demand , and it was again refused.

They did nothing further until this action for habeas corpus was commenced on April 5, 1960, the day after Thomas had procured the entry of the decree of divorce which his wife, Anna Lou Davison, had filed against him some time previously. As the child was born more than two months prior to the marriage, it, of course, was not a child born of the marriage, but was a child born out

of wedlock, the child of an adulterous affair. This was true both at the time of its birth and at the time the release for adoption (Defendant's Exhibit 1) was executed, acknowledged, and delivered.

Substantially all of these facts were made to appear by the depositions of Thomas and Kathleen McMurtrey and by certified copies of the documents relating to the marriage and divorce of Thomas and the purported marriage of these parties in Idaho. Accordingly defendant moved for summary judgment (R 45) but the court denied the motion *pro forma.*

The entire depositions of the plaintiffs on discovery were introduced in evidence by the plaintiffs themselves (T 89, lines 11 to 15).

Defendant, by its answer, denied that the release had been obtained by coercion or undue influence, and denied that Thomas had any right or interest in the child at time of the issuance of the writ. Defendant alleged that the purported marriage of the plaintiffs was void, first because at the time Thomas had a wife living from whom he had not been divorced, and also because the inter-racial marriage was probibited and declared void by Utah law, which was applicable, as plaintiffs were domiciled in Utah. Defendant further alleged affirmatively that the plaintiffs are not fit and proper persons to have the custody of the child and that the child's welfare required that she be remanded to defendant for completion of the adoption contemplated by the release. (R 64 et seq)

Plaintiffs moved to strike from defendant's answer the allegations that the natural parents' unfitness and

the welfare of the child require that it be remanded to defendant for completion of the adoption plan. The court took these motions under advisement until the conclusion of the trial and then granted them, upon the theory, apparently, that inasmuch as the court had found and determined that neither of the plaintiffs any technical legal rights to the child's custody, the question of their fitness to have custody, and the question of the child's welfare became moot, and it was unnecessary to rule upon the same.

At the conclusion of the protracted trial, and after judgment for defendant was entered, defendant filed its cost bill in which it claimed cost of a certified copy of the divorce decree of James N. Thomas, cost of a certified copy of the marriage certificate of the plaintiffs, the cost of the taking of the depositions of the plaintiffs Thomas which were introduced in evidence by the plaintiffs themselves, and the cost of the taking the depositions of Calvin McMurtrey and Mary McMurtrey, parents of Kathleen, who are residents of Idaho. It should be noted that the depositions of the witnesses McMurtrey were taken in good faith in a belief that their testimony would be necessary upon the issue of conspiracy, deceit, coerion, undue influence, etc., raised by the plaintiffs, who had charged conspiracy between defendant and the parents of Kathleen. The testimony in their depositions clearly negatived any such conspiracy, and at the time of the trial the plaintiffs introduced no substantial evidence which would tend to show any such conspiracy. What would have been their testimony if the depositions had not been taken, and if the defendant had not been able to persuade these

parents to come from Idaho to attend the trial and i... available as witnesses is, of course, a matter of con... jecture.

At any rate, on plaintiffs' motion, the court struck from defendant's cost bill all of the above items. With respect to the certified copies relating to marital status of the parties, it is to be observed that even in the amended petition for habeas corpus, plaintiffs alleged they were married in the State of Idaho (R 54).

STATEMENT OF POINTS

Points Relating to Appellants' Appeal

1. Plaintiff Kathleen McMurtrey voluntarily, effectively, and irrevocably transferred to Children's Aid Society her prior and superior rights to the custody of the child.

   A. The release was voluntarily given without any coercion.

   B. The release is properly acknowledged, and no oath is required by law.

   C. The release is irrevocable under Section 55-10-42, Utah Code Annotated, 1953.

2. The rights of the defendant society to the custody of the child are prior and superior to the rights of the plaintiff Thomas, if any he has.

   A. The child was and is an illegitimate child within the meaning of the adoption statute, Section 78-30-4, Utah Code Annotated, 1953.

      (1) The child was born out of wedlock and is not the issue of any marriage under Section 30-1-3, nor Section 74-4-10 Utah Code Annotated, 1953.

(2) Thomas has not legally adopted the child by recognition with his lawful wife's consent.

(3) The child has not been legitimized by a valid marriage of its natural parents.

B. The rights of plaintiff Thomas, if any, to the custody of his illegitimate child are subordinate to the rights of the defendant society and the proposed adoptive parents.

(1) At the time of the conception and of the birth of the child, Thomas's subordinate rights to custody were subject to being divested and were divested by the mother's release under Section 78-30-4, Utah Code Annotated, 1953.

(2) The rights of defendant society and the adoptive parents with whom the child is placed, as transferees of the rights of the natural mother, are superior to those of Thomas.

3. The fitness of the natural parents to have custody of the child, and the welfare of the child as affected by such custody, were and are relevant and material issues, and if for any reason this case is remanded for further proceedings, the defendant's allegations on such issues should be reinstated and tried.

4. The court did not err in granting a continuance of the trial. In any event, the error, if any, is harmless.

5. The court did not err in its findings.

Points Relative to Defendant's Cross-Appeal

I

The cost of certified copies of the documents relating

to plaintiff's marriage status, and the cost of the de-
positions of plaintiffs and of the witnesses McMurtre
are properly chargeable and should be reinstated

ARGUMENTS

1. *Plaintiff Kathleen McMurtrey voluntarily, ef-
fectively, and irrevocably trnsferred to Children's Aid
Society her prior and superior rights to the custody o
the child.*

A. *The release was voluntarily given without an
coercion.*

Plaintiffs below and in their brief contend that Kathleen was coerced into releasing her child to the defendant. However they did not see fit to argue the point in their brief and so we will not belabor it. Never-the less, as the court must presumably dispose of this issue, it occurs to us that a few comments are in order and may be helpful.

The trial court, after hearing all the testimony and ob-serving plaintiff Kathleen upon the stand, specifically found that Kathleen executed and acknowledged the re-lease willingly and voluntarily and that the release was not secured by duress, undue influence, intimidation or force, nor pursuant to any conspiracy. (R 164, finding 8) Under these circumstances, under familiar principles, this court will not disturb the finding of the trial court unless it is clearly and manifestly against the clear weight of the evidence.

Actually the finding is supported by the weight of the evidence, as a reading of the testimony of Kathleen

and that of Mr. Wheatley makes very manifest. It is clear that Kathleen's parents were very naturally much disturbed by their daughter's illicit affair and pregnancy and probably their distress was heightened by the fact that Kathleen's lover was a negro and they were very cognizant of the two-way prejudice which in fact exists betwen the two races in most, if not all, American communities, and which definitely existed in their own small community in Idaho. However there is nothing in the record to show that their activities at any time went beyond those prompted by the normal and proper concern of parents for a wayward daughter who was in great difficulty. If anything, it would seem that they practiced unusual restraint. Certainly they advised her that it would be best for her and for the child to place it for adoption. Certainly they expressed resentment and suspicion of James Thomas. And certainly they declined to accept James Thomas or his mulatto child into their home in their small community, as was their right. However they were always willing to accept and did accept Kathleen into their home, even after her mistakes. The record is clear that they were and are loving parents doing the best they can for their child and giving her the best and wisest counsel which they could give her.

Moreover, from Kathleen's own testimony in her deposition and at the trial, it is very clear that her reaction to the counsel of her parents was entirely negative: She was a wayward girl who would rather flout her parents' wishes and advice than follow them. She was an experienced woman, completely emancipated. She had not seen her parents for approximately a month

prior to the time she decided to release the child when Mr. Wheatley visited her at the hospital.

That her decision not to see James Thomas during the last months of her pregnancy was her own, is clearly indicated by her admission that her parents furnished her money which she could have used to telephone him or to write him a letter if she had wished to. (T 62-63)

Her own testimony of the consultations with Wheatley totally negatives any coercion, and Wheatley's testimony amply supports the court's finding.

Kathleen was not in fact coerced into surrendering her child, but on the contrary, with an eye to possible marriage with a student from Iraq, she made up her mind to get rid of an impediment, even though her feelings may not have been completely unmixed. The decision was hers.

B. *The release is properly acknowledged, and no oath is required by law.*

The plaintiffs contend in their brief (Point VI, page 24) that the release, Defendant's Exhibit 1, was not "acknowledged" as required by Section 78-30-4, Utah Code Annotated 1953. All of the authorities cited by plaintiffs in support of this contention, however, relate *not to acknowledgments, but to the administration of an oath.* The taking of an acknowledgment and the administration of an oath are of course two different things, and the authorities cited and relied on by plaintiffs are completely irrelevant to their contention.

While in some other states the statutes require that an acknowledgment include a declaration to the effect that

the document in question was executed "freely and voluntarily, and for the uses and purposes therein declared," or words of similar import, the Utah Statutes recognize that such matters as coercion or mistake are matters of affirmative defense. Accordingly the Utah Statute merely requires that the signer of the document acknowledge "that he executed the same." The notarial certificate which is a part of Defendant's Exhibit 1 in this case complies strictly with the requirements of the statutes. It is particularly to be noted that no oath is required to be administered. *See Section* 57-2-7, *Utah Code Annotated*, 1953.

It is submitted that the requirements of the statute were fully and substantially complied with. Indeed the transaction probably went further than would be required. It will be remembered that the release was prepared by Wheatley and brought by him and given to Kathleen to read. She, an educated woman, read it. She observed to Wheatley that it had to be "notarized." Wheatley stated to her that he was a Notary Public and could and would notarize the document. The document itself, read by Kathleen and then signed and handed to Wheatley, contains the following provision:

> "I have executed this document voluntarily in the light of my understanding and without influence, intimidation, or hope of reward whatsoever."

Kathleen in fact signed, executed and delivered the document in the presence of the Notary against this background. It is submitted that this is a sufficient acknowledgment and declaration to satisfy every requirement of the statutes, and that the document was acknowledged.

Moreover, the certificate of acknowledgment, duly executed and sealed by Mr. Wheatley as a Notary Public, is regular in form and makes the required statutory recitals. Under these circumstances, while the certificate is not conclusive and may be rebutted, it is *prima facie* evidence of the facts therein stated.

> Tarpey vs. Deseret Salt Company,
> 5 Utah 205, 211, 14 Pac. 338.

Moreover, the certificate is aided by a presumption of regularity, apparently one aspect of the general presumption of a regularity of the official proceedings of public officers.

> 1 Am. Jur. 346, "Acknowledgments" Section 77.

Inasmuch as the certificate creates a *prima facie* case, it alone is sufficient to support the finding of the court (R 162-163, Finding 3) that the release was duly acknowledged. The presumption of correctness of the trial court's finding now further buttresses defendant's contention that the document was duly acknowledged.

It is interesting to note that Kathleen has twice formally and under oath acknowledged the execution of the release in question since the commencement of this action: once on the taking of her deposition before the court reporter and Notary Public (185, Deposition, pages 68-70), and once upon the giving of her testimony before the court at the trial (T 53).

It is also pertinent and interesting to note that under the provisions of *Section* 55-10-42, *Utah Code Annotated,* 1953, Kathleen is not entitled to recover custody of the child even if the release, Exhibit 1, were not acknowledged. That statute reads as follows:

> "55-10-42. No parent or guardian or other person who by instrument of writing surrenders, or has surrendered heretofore, the custody of a child to any children's aid society or institution, shall thereafter, contrary to the terms of such instrument, be entitled to custody or control or authority over, or any right to interfere with, any such child, and these same conditions shall prevail where the child has been delivered to a Children's Aid Society or institution by the action of any proper court."

It is to be noted that no requirement of acknowledgment is imposed by this statute, and that inasmuch as this particular action involves the custody of the child prior to the commencement of adoption proceedings, this statute, rather than *Section* 78-30-4, *Utah Code Annotated*, 1953, relied on by plaintiffs, applies at this stage of the proceeding. The history of *Section* 55-10-42 above mentioned indicate that it is, and since its inception in 1903, has been entirely separate and apart from the adoption statutes, and is intended to provide necessary stability for the care of children in whose interests a children's aid society, as a quasi-public agency regulated by the state, has been compelled to intervene with the written consent of the parents. It is a very proper exercise of the state's authority and responsibility as *parens patriae*.

Where it becomes necessary permanently to transfer the custody of a child to an agency of the state for its own welfare, the strongest considerations of the child's welfare, of a necessary stability in its life and of the intervening rights of those who may assume the care which the parents have declined, all combine to dictate that there must be some definite "cut-off date" after

which the natural parents cannot again interfere or meddle in the life of the child or its adoptive parents. Any other rule but the one here contended for and provided by the statute would leave all adoptive children and their adoptive parents at the mercy of disturbed and anti-social natural parents, and could cause the greatest harm, both to the child and to society generally. The statute is an eminently proper and necessary statute and should be liberally construed and applied to effectuate its objects.

There is no merit to plaintiffs' contention that the release is void for want of acknowledgment.

C. *The release is irrevocable under Section* 78-10-42, *Utah Code Annotated,* 1953.

What has already been said under sub-point B above ,should serve adequately to demonstrate this point also. *Section* 55-10-42 in purpose and effect renders a release irrevocable *when made to a duly licensed children's aid society,* as an agency of the state, even though the same be not acknowledged. For the reasons given, this is and must be the rule, and is the plain intent of the statute. For these reason, Kathleen's change of heart after she had gone home to her parents following the signing of the release, and her subsequent demand for the return of her child have no legal significance or effect whatsoever. If her release had run to one other than a children's aid society, the rule might be otherwise,but this is not the case when, as here, the release is given, after proper counseling, to an official State-licensed children's aid society. Any other rule could only create chaos and make it virtually impossible to place children for adoption in proper homes, for it is common knowledge that the mothers of such children

are more often than not somewhat emotionally disturbed. The press is full of stories, which represent only a small fraction of cases occuring, where such mothers have changed their minds to the great heartbreak of all concerned and, it is submitted, to the great damage of their children who have been settled in a stable home and situation. See, in this connection,

In re Adoption of D,

122 Utah 525, 252 Pac. 2d, 223.

2. *The rights of the defendant society to the custody of the child are prior and superior to the rights of Thomas, if any he has.*

A. The child was and is an illegitimate child within *the meaning of the adoption statute, Section* 78-30-4, *Utah Code Annotated,* 1953.

(1) *The child was born out of wedlock and is not the issue of any marriage under Section* 30-1-3, *or Section* 74-4-10 *Utah Code Annotated,* 1953.

It is alleged and admitted that the child was born to the plaintiffs out of wedlock on April 13, 1959. It is admitted without question that at the time of the conception and at the time of the birth of the child, no marriage ceremony between the plaintiffs had ever been performed or attempted. No marriage between them is even claimed to have taken place until June 18, 1959, more than two months *after* the birth of the child. It is further admitted (T 16, line 20, to T 17, line 12) that at all these times and until July 4, 1960, some three months after the commencement of this action, Thomas had another wife living and undivorced, so that he was

incapable of contracting a valid marriage under the provisions of *Section* 30-1-2 (2), *Utah Code Annotated*, 1953, reading as follows:

> "30-1-2. The following marriages are prohibited and declared void:
>
> (2) when there is a husband or wife living from whom the person marrying has not been divorced."

Such a marriage is void ab initio, for all purposes, no matter what the good faith of the parties, and neither party to such a void marriage can claim any of the rights or benefits therefrom. This is true even though the rights of the innocent issue of such a marriage will be protected if the parties in good faith believed that the impediment to the existing marriage had been removed by divorce.

> Utah Fuel Company vs. Industrial Commission, 65 Utah 100, 234 Pac. 697.

Furthermore, in view of the fact that *the birth preceded the marriage,* it is very clear that this child is not *"the issue of such marriage"* contracted in good faith and in ignorance of existing impediments under Section 30-1-3, *Utah Code Annotated,* 1953. The facts simply do not bring the plaintiffs within the terms of that statute.

For the same reason the facts do not bring plaintiffs within the terms of Section 74-4-10, U.C.A. 1953, providing that *"The issue of all marriages null in law"* are legitimate.

To hold that the subsequent marriage of the parents of an illegitimate child brings the parties within the protection this statute would jeopardize the status

and security of 90% of the adopted children in the State of Utah, for, if the rule were as plaintiffs contend, the deathbed marriage of the natural parents of an illegitimate child occurring many years after completion of its adoption would render it legitimate and void the consent to adoption executed by the mother alone. Clearly this cannot be the rule. Even if the subsequent marriage were valid, it is clear that where, as here, the rights of third parties in the persons of the defendant and of the proposed adoptive parents have intervened, the artificial doctrine of "Relation Back" cannot be indulged in order to invalidate the previously completed release of the mother of the illegitimate child.

The child was not the issue of the purported marriage or the plaintiffs, having been born before that marriage, and for this reason the child cannot be held to be legitimate by reason of the provisions of Section 30-1-3 or of Section 74-4-10, above mentioned, and the purported marriage can avail Thomas nothing in his claims with respect to the child.

A. (2) *Thomas has not legally adopted the child by recognition with his lawful wife's consent.*

Plaintiff Thomas claims that he adopted the child prior to its birth by setting up housekeeping in an adulterous relationship with the child's mother. This contention finds no support in the facts or the law.

Plaintiff Thomas relies upon *Section* 78-30-12, *Utah Code Annotated*, 1953, to the effect that the father of an illegitimate child, by publicly acknowledging as his own, "*receiving it as such with the consent of his wife, if*

he is married, into his family" and otherwise treating as if it were a legitimate child, thereby adopts it, and becomes legitimate from the time of its birth.

The facts do not bring this case within this statute. It is admitted that at the time Thomas received the pregnant mother into his apartment, he was validly married to Anna Lou Davison, and there is no evidence whatsoever that Ann Lou Davison ever consented to such an act or consented to this adoption by her husband of this illegitimate child. Nothing is said in the statute about dispensing with the legal wife's consent just because of a separation, but if he is married, his wife's consent is an absolute prerequisite to the change of the relationship from illegitimacy to legitimacy. This is of course a very salutary rule, for otherwise a roving husband could leave his wife and beget a dozen illegitimate children who would crowd her and her own legitimate child out of their home and proper rights with respect to support and protection from their husband and father.

Harrison vs. Harker,
44 Utah 541, 142 Pac. 716,

relied on by plaintiffs is not in point. In that case the natural father of the child was not married to a lawful wife, as here, and so no consent to his adoption by acknowledgment was required. Furthermore, in that case the natural parents had consumated a valid marriage to which there was no legal impediment, and thus legitimated the child. In this case the marriage is absolutely void.

Neither did Thomas receive the *child* "into his family" as required by the statute. He merely received its

pregnant mother into an adulterous apartment, while separated from his family. That is quite a different set of facts.

In this case Thomas has not legally adopted the child by recognition with his lawful wife's consent and hence cannot claim any rights as the adoptive father of the child, and his argument on that point is not well taken.

> *(3) The child has not been legitimated by a valid marriage of its natural parents.*

Thomas claims some rights with respect to the custody of the child under the provisions of *Section* 77-60-14, *Utah Code Annotated,* 1953, reading as follows:

> "77-60-14. If the mother of any such child and the father shall at any time after its birth intermarry, the child shall in all respects be deemed to be legitimate, and the bond for its support shall thereupon become void."

Here again the facts of this case do not bring the plaintiffs within the benefits of the statute on which they rely. It is to be noticed that the statute requires that the parents "intermarry" not that they "go through a void marriage ceremony." For the reasons discussed under sub-point (1) above, the purported marriage of the plaintiffs was absolutely null, void and of no effect from the beginning because Thomas had, at the time, a wife living and undivorced. The plaintiffs do not contend and indeed they could not contend that the marriage ceremony performed over them in fact and law effected a marriage, because under the law a bigamous marriage is null and void. In this connection, of course, the pre-

sumption is that the Idaho law is the same as Utah's in the absence of proof to the contrary, and in point of fact, the Idaho law does prohibit and declare void bigamous marriages.

See *Section* 32-207 *Idaho Code.*

Hence, the parties never have, in fact or in law, "intermarried", and *Section* 77-60-14 UCA. 1953, is inapplicable here.

This section, of course, must be contrasted with *Section* 30-1-3 in which the issue of a marriage contracted in the mistaken belief that a living spouse was dead or divorced, will serve to render the issue of such a marriage legitimate. The statute now under consideration requires an actual valid and legal marriage before plaintiffs can claim any benefits thereunder. For this reason, Thomas' contention that he belived he had been divorced is totally irrelevent to any issue before the court in this case.

The plaintiff Thomas, in his brief, refers to

Section 30-1-2, Sub-section (5),

declaring void the marriage between a negro and a white person, and contends that this section is unconstitutional as depriving him of equal protection of the law. The trial court did apply this provision under the authority of

In re Vetas' Estate
110 Utah 187, 170 Pac. 2d 183,

as an additional and supplementary ground for holding the purported marriage of the plaintiffs in Idaho void and ineffective, and the trial court did hold that the clause challenged by Thomas was constitutional as being

a proper and legal classification within the legislative discretion and police power, considered in the light of the evils against which it was intended to protect. Moreover, the negro race as well as the white race has the benefit of this statute so that Thomas is not in a position to urge the unconstitutionality of the law. Generally, such statutes are upheld and the decision by the State of California, on which Thomas relies, stands as a hopeful minority of one. This matter was briefed for the trial court, and if this court desires to explore the matter, it will find the discussion included in the Record at Page 195 and following.

However, it is respectfully submitted that in view of the admitted and demonstrated invalidity of the plaintiffs' polygamous marriage the question of the validity or nonvalidity of the anti-miscegenation statute becomes moot, and it is neither necessary nor desirable that this court here attempt to solve this difficult and thorny question.

It is firmly and universally established that courts will not determine the constitutionality of legislative enactments unless such determination is absolutely essential to a determination of a party's rights in the action before the court, and if those rights can be properly determined without reference to the constitutionality of a statute, the court will refuse to consider the constitutional question and will make the determination upon the other available ground. See

16 CJS "Constitutional Law" Section 94, Pages 306 and 317;

11 Am Jur "Constitutional Law" Sections 93

and 94, pages 720 and 723 and following; and State vs. Kallis 97 Utah 492, 94 Pac. 2d 414.

Accordingly, it is respectfully submitted that this court, under the law, should not accept the plaintiffs' invitation to consider and pass upon this collateral and unnecessary constitutional question, but should base its decision upon the admitted fact that the bigamous character of the marriage renders it void for all purposes.

B. *The rights of plaintiff Thomas, if any, to the custody of his illegitimate child are subordinate to the rights of the defendant society and the proposed adoptive parents.*

(1) *At the time of the conception and of the birth of the child, Thomas' subordinate rights to custody were subject to being divested and were divested by the mother's release under Section* 70-30-4, *Utah Code Annotated,* 1953.

It may be conceded that at the English Common Law the plaintiff Thomas as the father of an illegitimate child would have certain rights to its custody which, nevertheless, were secondary and subordinate to the primary and superior rights of the natural mother of the child. See

7 Am Jur "Bastards" Section 61 and 63, pages 668 and 669.

At the time this illegitimate child was begotten by and born to Thomas in an adulterous relationship, the common law rights of the father in his child had been further limited and qualified by the enactment of *Section* 78-30-4 *UCA,* 1953, and *Section* 55-10-42 *UCA,* 1953, here-

mbefore quoted. It will be recalled that the former authorizes the mother of an illegitimate child without the concurrence of the father to transfer and release to a licensed agency her superior and prior rights to the custody of her child and to consent to its adoption through the child placing agency, while the latter again recognizes this right and makes the transfer irrevocable. Thus, the situation here is that at the time Thomas begot the child in question he did so *subject to the provisions of this statute*, under which the mother of the child may, without his consent, transfer her prior and superior rights to the child and consent to its adoption without his concurrence. In other words, in Utah, Thomas never did have any right to challenge the action of Kathleen in releasing the child as she did. There is not and never has been any natural and unalienable right to beget illegitimate children in an adulterous relation and then claim the child as a chattel. He has never been deprived of any right which he ever possessed.

It is clear that the legislature, in discharging its duties for the protection of illegitimate children, contemplated that any rights of the father of such a child would be inferior to those of the mother and inferior to those of a licensed child placing agency to whom the mother transfered her rights. It is further clear that the legislature contemplated that any subordinate rights that the father of an illegitimate child might have *would be subject to being divested by the* action of the mother in transferring the custody of the child to a licensed child placing agency and authorizing it to place the child and procure its adoption. If this were not the case, then no adoption of any illegitimate child could be

consumated without notice to the father of the illegitimate child and an opportunity to him to be heard, for otherwise he would be deprived of rights without due process. However, inasmuch as he has no rights which are not subject to being divested by the action authorized by the statute, his constitutional rights and privileges are in no way infringed. By begetting an illegitimate child, he of his own free will chooses the course which leaves him without any substantial rights in a case such as this.

In passing, it may be respectfully submitted that to hold, as the plaintiffs request, would do limitless and irremedial mischief throughout Utah and indeed throughout substantially all of the states, for the rule for which plaintiffs here contend would invalidate substantially all of the adoptions of illegitimate children in Utah and elsewhere.

It is respectfully submitted that the court should construe the statutes in question as a limitation upon the nature and extent of the rights, if any, which Thomas as the father of an illegitimate child acquired, so that the exercise of the power granted by statute to the mother legally divested Thomas of even secondary or subordinate rights which he held subject to the power. The situation is very analagous to one where land is devised to a person subject to a pre-existing power of alienation. The exercise of the power of alienation certainly does not deprive the devisee of any property rights without due process. *Section* 70-30-4 *UCA*, 1953, is valid and constitutional and does not infringe any right held by Thomas.

Such a case has never been before this court before.

but it has been before others and the rule is as contended for by defendant.

See Weaver vs. Johnson (Texas 1948)
212 S.W. 2nd, 197, and cases there cited;
Marshall vs. Reams (Florida 1883)
14 Southern 95; and
Day vs. Hatton (Georgia 1954),
82 S.E. 2nd 6

It is respectfully submitted that Thomas has never been deprived of any rights which he has with respect to this child and that *Section* 70-30-4, *UCA*, 1953, is valid and constitutional.

A problem of a similar nature and involving the same considerations of policy were before this court in the case of

In re Adoption of D—
122 Utah 525, 252 Pac 2d 223.

The court there held that under the public policy set by *Section* 55-10-42 *UCA*, 1953 the consent to an adoption given by the natural mother is irrevocable. The court also declares that public policy favors adoption of children who are left without parental refuge, and comments, "Adoptive parents should not be discouraged by a construction of the law which would cause them to fear the consequences of accepting a child because of the knowledge that the fate of their efforts would be at the will of the natural parent."

Certainly the welfare of illegitimate children should not be jeopardized by a construction, especially a strained construction such as that advocated by plaintiffs, which would leave them at the mercy of the father

of the child who might see fit to return years afte having left the scene to avoid responsibility and claim that he had constitutional rights in the chil which he had never surrendered. Everyone who is as sociated with the work of adoption agencies knows that in many cases the fathers of illegitimate children are never even informed of the birth of their child. The also know that it is far from infrequent for the parent of such a child to repent many years after when the situation has changed, as for example, when the parent has entered into a barren marriage.

B. (2) *The rights of defendant society and the adoptive parents with whom the child is placed, as transferees of the rights of the natural mother, are superior to those of Thomas.*

Little need be added under this point, as what has been said under the previous points made, it is submitted, establishes the legal validity of the stand here taken by defendant. The language of *Section* 78-30-4 *UCA* 1953, is that the consent of a parent to adoption is not necessary where the parent has "*released* his or her or their control or *custody* of such child *to* an agency licensed to receive children for placement or adoption." The release and transfer of rights with respect to the custody of the child is obviously contemplated and was here accomplished on April 14, 1959. Since then, the child has been in the care and custody of defendant and the adoptive parents selected by it.

Plaintiffs concede that at common law the rights of the mother of an illegitimate child to its custody are superior to those of its father, and the defendant here,

having succeeded to the rights of the mother by virtue of the release, has acquired rights superior to those of the father. As between the two plaintiffs the defendant agency now stands in the place of the mother and asserts all of the rights which she could have asserted against the father had he attempted to take the custody from her.

This conclusion is fortified by a consideration of the provisions of *Chapter 8 of Title* 55, *U.C.A.* 1953, under which defendant is licensed. Section 55-8-2 (c) provides that no person shall hereafter "assign, relinquish or otherwise transfer" his rights or duties with respect to the care or custody of a child *except to a licensed agency*, or pursuant to the lawful order of a court or to a relative within the second degree. As indicated, these two statutes, which are *in pari materia,* indicates that a *transfer* of rights is contemplated.

It is therefore respectfully submitted that the absence of the consent of James Thomas, the natural father of the illegitimate child in question, is irrevelent and immaterial and gives him no right to the custody of the child as against this defendant and the adoptive parents selected by it.

3. *The fitness of the natural parents to have custody of the child, and the welfare of the child as affected by such custody, were and are relevant and material issues, and if for any reason this case is remanded for further proceedings, the defendant's allegations on such issues should be reinstated and tried.*

It is true that the determination by the trial court that the defendant had the suprior legal right to the

custody of the child in question rendered moot and immaterial the question of the fitness of the natural parents and the question of the basic welfare of the child. This point becomes material only if the court should for any reason determine that the plaintiffs or one of them has a superior technical legal right to the child's custody under the facts and the law. In the event of such a determination then it would be necessary to make an inquiry into the welfare of the child.

This court has held in every case in which the issue has been presented that in the case of habeas corpus for the custody of an infant child the controlling issue is the best interest and the welfare of the child, and not any technical legal rights which either party may have.

Perhaps the leading modern case from this court is that of

Walton vs. Coffman 110 Utah 1, 169 Pac 2d 97.

It has become a leading case in this jurisdiction and is frequently cited in other jurisdictions. It was decided in 1946. It was a case of habeas corpus brought by the natural mother of two minor children against her father and mother, the grandparents of the children. The plaintiff, having been deserted by her husband, left the children with her parents for a period of several years and the children's grandparents cared for them during that time. After a quarrel over the manner in which the plaintiff was living, the plaintiff brought habeas corpus against her parents to recover possession of the children. After reviewing substantially all of the previous decisions of the court, it was held in a carefully considered opinion as follows:

"In habeas corpus proceedings involving the custody of an infant, the determining factor is the best interest and welfare of the child.

"In determining what would be for the best interest and welfare of the infant, the presumption that it will be for the infant's best interest and welfare to be reared under care, custody and control of its natural parents is not overcome unless from all of the evidence the trier of the facts is satisfied that the welfare of the child requires the custody to be awarded to someone other than the natural parent.

"The presumption that it will be for the best interest and welfare of the infant to be reared under the care, custody and control of its natural parents is one of fact and not of law and may be overcome by any competent evidence which is sufficient to satisfy a reasonable mind thereon."

The court then concluded that the welfare of the children in that case required that they be remanded into the custody of their grandparents where they had spent the last several years of their lives.

See also

Hummel vs. Parrish
43 Utah 373, 134 Pac. 898;
Jacob vs. State
7 Utah 2d 304, 223 Pac. 2d 720.

The case of

Stanford vs. Gray,
42 Utah 228, 129 Pac. 423

is in point. It was a case of habeas corpus by the natural mother to recover her child's custody. The child was illeg-

itimate, and after having some difficulty in caring for the child, the mother had, by written instrument, released her care, custody and control of the child for purposes of adoption to a child placing agency. The agency placed the child in the custody of prospective adoptive parents who desired to adopt him and who were ready, willing and able so to do. However, before the adoption was consumated by court proceedings, the mother somehow located the proposed adoptive parents and brought an action of habeas corpus against them. A decree in favor of the natural mother was reversed by the Supreme Court and the child remanded into the custody of the adoptive parents for completion of the adoption. The court held that a contract by a parent fairly made surrendering the custody of the child to a "children's home" is valid as between the parties. It found that the plaintiff's claim that she was coerced or persuaded by fraud to execute the release of custody was not supported by the evidence. The court then made a most interesting and pertinent determination. It held that where, as here, a parent had contracted away the custody of a minor and seeks to recover it, *the fact of the contract or release places the burden upon the natural parent to show that the welfare of the child will be best served by the return of the child to her.* In other words, where a release has been executed as contemplated by *Section* 55-10-42, *U.C.A.* 1953, the parent loses the benefit of the presumption that the child's interest will be best served by being placed in the custody of the natural parents, and the burden involving the risk of persuasion is placed upon the natural parent who seeks to set aside the release of custody and recover possession of the child in a

habeas corpus proceeding. The court again held that the welfare of the child is the paramount issue to be decided.

Under the circumstances here, and under the law announced in that case, the failure of the plaintiffs here to plead and prove that the welfare of the child required its return into their custody is fatal to their case.

See also

Ex parte Flora
84 Utah 143, 29 Pac 2d 498;
Briggs vs. Briggs
111 Utah 418, 181 Pac 2d 223, 227;
Hardcastle vs. Hardcastle,
118 Utah 192, 221 Pac 2d 883, 886; and
State in the Interest of K-B-
7 Utah 2d 398, 322 Pac 2d 595.

Indeed, under the facts here stated, and even though the issue of welfare was not specifically tried, the evidence certainly clearly indicates that the welfare of the child would not be served by returning it to its natural parents, the plaintiffs here, who are openly cohabiting together in a relationship prohibited by law and under a purported marriage which is void. In this connection see

State in the Interest of Black,
3 Utah 2d 315, 283 Pac 2d, 887.

This was the famous "Short Creek Case" where the court held that claims of unconstitutionality of a criminal statute did not justify parents in living in open violation of the law and that such conduct justified depriving the parents of the custody of their children, particularly

where they were by precept and example encouraging their children also to break the law.

For these reasons, it is respectfully submitted that irrespective of all other determinations of law discussed, the failure of the plaintiff to prove that the welfare of the child requires its return to them and the showing in the record that the welfare of the child requires, to the contrary, makes it the clear duty of the court to affirm the judgment below, but, if the judgment be not affirmed but should be remanded for further proceedings, then the issue of welfare should be directed to be tried as the paramount and controlling factor.

4. *The court did not err in granting a continuance of the trial. In any event, the error, if any, is harmless.*

The plaintiffs here argue that the court abused its discretion in granting, on September 16th, a continuance to enable defendant to procure the transcript of the deposition of Wheatley, which had been taken on September 10th. They refer to pages 110 and 111 of the Record to impeach the court's recital that the continuance was granted on stipulation. The documents there show plaintiffs protested the taking of the deposition, *not the continuance,* and the court's recital alone and correctly stated in the Record the basis for the order.

However that may be, the plaintiffs do not contend and do not claim that by this continuance they were denied any substantial right. As they themselves state, at the time of the trial, the issues which the court accepted were fully tried, and the record is voluminous and complete, and the plaintiffs were fully and fairly heard upon all of their valid and invalid contentions.

[illegible] appears clear that even if there were error in the [illegible] court exercised its discretion to grant the continuance to enable defendant to complete preparation [illegible] defense, the error was not prejudicial to the case of the plaintiffs. Accordingly, it cannot, under the provisions of *Rule* 61, *Utah Rules of Civil Procedure*, be the basis for any reversal of the trial court's final judgment.

3. The court did not err in its findings.

Plaintiffs in their point IV complain of the trial court's failure to find (1) that their purported marriage in Idaho was entered into in good faith in the belief that James' first wife had divorced him, and (2) that they returned to Utah only for the purpose of securing custody of their child and to pay debts.

This was neither error nor prejudicial.

As for their claim of a belief that Thomas was legally divorced, plaintiffs do not refer to any testimony in the record to support this claim. On the contrary, Mr. Wheatley testified that during one of his conferences with Kathleen (who is also known as Louise) prior to the birth of the baby, "Louise said that she didn't know if it was possible to marry him or not because she did not know whether he was divorced from his first wife." She could have received the information which was the basis for this expressed doubt only from Thomas. This clearly negatives any good faith belief in a divorce.

In any event, for the reasons heretofore discussed, their good faith belief in a divorce is entirely irrelevent

and immaterial under the law and the other facts. The court has held that failure to find on an immaterial issue is not error.

Mills vs. Gray
50 Utah 224, 167 Pac 358

Certainly failure to find on an issue which becomes immaterial cannot be prejudicial error under *Rule 61 Utah Rules of Civil Procedure.*

The court did find (R 163) that at the time of the marriage the plaintiffs were domiciled in and were citizens and residents of Utah. Prior to their one-day trip to Idaho they were domiciled in Utah and never took up residence elsewhere. Their purpose in returning to Utah and continuing their domicile in this State is irrevelent and immaterial. The fact is that they intentionally returned and continued their residence and domicile here.

The court committed no reversable error here.

Point on Defendant's Cross Appeal

I

The cost of certified copies of the documents relating to plaintiffs' marriage status, and the cost the depositions of plaintiffs and of the witness McMurtrey are properly chargeable and should be reinstated.

No question was ever raised in the motion to re-tax costs as to defendant's good faith in obtaining the certified copies of the documente used to prove the marriage status (or rather the lack of it) of the plaintiffs. Plaintiffs originally alleged that they had married and were hus-

had sued and amended their petition only after being confronted with certified copies of these documents submitted in support of a motion for summary judgment. Moreover only did they admit that James Thomas was a married man who had a wife other than Kathleen. It is respectfully submitted that inasmuch as the true situation was cleared up by means of these documents and judicial admission of plaintiffs with respect to the marriage status should not and cannot operate to deprive defendant of its costs in this regard.

Smith vs. Smith
77 Utah 60, 70, 291 Pac 298.

With respect to the depositions of the plaintiffs, although they were taken primarily for discovery at the outset of the case, they were actually used at the trial and also in the subsequent taking of the deposition of the witness Wheatley which was read at the trial. Moreover upon the trial court's comment that these depositions which were used in support of defendant's motion for summary judgment, were more complete than the plaintiffs' testimony given at the trial, the plaintiffs themselves offered these depositions in evidence (T 88 and 89) and they were received on plaintiffs' offer. It is respectfully submitted that where depositions are taken at defendant's expense and then used in good faith at the trial and considered by the court, and particularly when they are *introduced in evidence by the plaintiffs themselves*, the plaintiffs cannot be heard to claim that the expense incident to their taking is not a chargeable cost.

With respect to the depositions of Mr. and Mrs.

McMurtrey, the record discloses that they were residents of Idaho not amenable to the process of the court. Conspiracy to coerce Kathleen was charged in both the original and in the amended petition. Any diligence in preparation required the taking of their depositions for use at the trial, and this was done while plaintiffs were charging conspiracy. Defendants good faith in taking their depositions is not challenged. The mere fact that at the trial plaintiffs failed to make a case of conspiracy which required rebuttal, while still relying on it, certainly does not justify a refusal to charge the cost of these depositions. Many witnesses are called in good faith and attend who do not testify.

It is submitted that it was error to strike from defendant's cost bill the expense incident to the taking of these depositions. The order of the trial court re-taxing costs should be reversed and defendant's judgment for costs reinstated in accordance with the original cost bill.

CONCLUSION

Before concluding, we feel that in fairness to the trial court and its clerk we should comment upon plaintiff's statement on page two of their brief that the depositions of Mr. and Mrs. McMurtrey, although not published, were opened. Plaintiffs charge that this is a "flagrant irregularity." We are sure that if counsel will tax his memory he will recall the circumstances of the opening of these depositions. In the course of the trial defendant obtained an order publishing the deposition of the witness Wheatley and requested the clerk to hand the official deposition to him for opening. The clerk inadvertently handed to defendant's counsel the depos-

son of the McMurtreys, and the envelope containing it was there opened by inadvertence before the mistake was discovered. Thereupon the depositions were returned to the envelope and handed to the clerk where they have remained undisturbed ever since. It was an inadvertence—not a "flagrant irregularity."

To return to the merits of this case, it is respectfully submitted that under the facts and the law here the plaintiff Kathleen McMurtrey willingly and voluntarily surrendered to defendant, a licensed child placing agency, the care custody and control of her child and that defendant thereupon succeeded to all her rights with respect to its custody as against all other persons, including the plaintiff Thomas. It is further submitted that by this act, the rights of the plaintiff Thomas, if any he had, were terminated pursuant to the existing statutory power vested in the mother of the illegitimate child, to which Thomas' rights, if any, were subject at the time of the conception and of the birth of the child. Hence, neither plaintiff has any right to the child as against the defendant agency or the adoptive parents with whom it has been placed.

It is further respectfully submitted that grave considerations of public policy and of the security and welfare of all illegitimate children who have been adopted under the laws of Utah, as well as existing law and logic require that the judgment of the trial court, remanding custody to defendant as of legal right, be affirmed. It is further respectfully submitted that plaintiffs having failed to allege and prove that the welfare of the child requires that it be remanded into their custody have

failed to make a case under the law of this State and that this also requires that the judgment of the trial court be affirmed.

Finally, it is respectfully submitted that the learned trial court erred in re-taxing defendant's costs and that its order in this respect should be reversed.

Respectfully submitted,

YOUNG, THATCHER & GLASMANN

By PAUL THATCHER

Attorneys for Defendant and Respondent